tion that there was no proof that the car had been stolen, but finally the police cancelled the conditions subject to which the car had been returned to the finance company, that the option by the plaintiff to complete the sale early under section 13 was only hypothetical and that if he had continued to pay all his instalments the company would have been able to pass the title to him.

With respect we cannot accept the plaintiff's arguments. In our view the principle enunciated in *Universal Cargo Carriers, supra,* does not apply. The principle there is that anticipatory breach of a contract can occur only if there has been some act by the *defendant* himself to make it obvious that he has renounced his liabilities under the contract or that it has become impossible for him to perform. Here on the other hand there has been no such act by the second defendant. If performance has been made impossible it was not because of their act but because of the intervention of a third party, the police.

We would therefore dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Rithauddin & Aziz; Khoo & Sidhu; Chye, Chow, Chung, Tang & Co.*

JAYANATHAN v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Suffian & Ong Hock Sim F.JJ.)

May 31, 1973]

[Johore Bahru — Federal Court Criminal Reference No. 5 of 1973]

Criminal Law and Procedure — Provision that a person guilty of an offence "shall be liable to imprisonment for a term not exceeding 5 years and not less than 2 years" — Whether imprisonment mandatory — Whether accused can be bound over under s. 294 of the Criminal Procedure Code (F.M.S. Cap. 6).

Prevention of Crime Ordinance, 1959, s. 15(4) — Whether overrules s. 294, Criminal Procedure Code (Cap. 6) — Whether imprisonment mandatory — Discretion.

In this case the following question of law was referred to the Federal Court:

> "Whether the provision of section 15(4) of Prevention of Crime Ordinance, 1959 overrules the provision of section 294 of the Criminal Procedure Code in so far as an offence against section 15 of the Prevention of Crime Ordinance is committed".

Under section 15(4) of the Prevention of Crime Ordinance a person found guilty of an offence "shall be liable to imprisonment for a term not exceeding 5 years and not less than 2 years". The accused in this case had pleaded guilty to a charge of contravening a restriction order imposed on him under the Ordinance and the President of the Sessions Court had bound him over in the sum of $1000 in one surety under section 294 of the Criminal Procedure Code. The High Court acting in revision set aside the order of the learned president and substituted a sentence of two years' imprisonment.

Held: (1) the provision of section 15(4) of the Prevention of Crime Ordinance does not overrule the provision of section 294 of the Criminal Procedure Code in so far as an offence against section 15 of the Ordinance is committed;

(2) the words "shall be liable" in section 15(4) of the Prevention of Crime Ordinance do not make the term of imprisonment mandatory and the learned president was therefore entitled to act under section 294 of the Criminal Procedure Code and bind over the accused.

Cases referred to:-

(1) *Public Prosecutor* v. *Hew Yew* [1972] 1 M.L.J. 164.

(2) *Public Prosecutor* v. *Man bin Ismail* [1939] M.L.J. Rep. 161; [1939] M.L.J. 207.

FEDERAL COURT.

Datuk Sri S. P. Seenivasagam for the applicant.

Gunn Chit Tuan (Senior Federal Counsel) for the respondent.

Ong Hock Sim F.J. (delivering judgment of the court): On May 6, 1973, we dealt with a reference to us under section 66 of the Courts of Judicature Act, 1964 reserving for the determination of this court a question of law of public interest, namely:

> "Whether the provision of section 15(4) of Prevention of Crime Ordinance, 1959 overrules the provision of section 294 of the Criminal Procedure Code in so far as an offence against section 15 of the Prevention of Crime Ordinance is committed."

We answered this question in the negative. Pursuant thereto and sub-section (5) of section 66, we set aside the order in revision of the learned judge and restored the order of binding over by the learned president. We said then we would give our reasons later. This we now do.

In this case, the applicant had pleaded guilty to a charge of contravening a restriction order imposed on him under section 15 of the Prevention of Crime Ordinance (No. 13 of 1959). The learned president bound him over in the sum of $1,000 in one surety under section 294 of the Criminal Procedure Code. The time for appeal having lapsed, the learned Deputy Public Prosecutor applied for revision of this order to the High Court on the ground that "the learned president erred in law in imposing a sentence of binding over when section 15(4) of the Ordinance clearly states "shall be liable to imprisonment for a term not exceeding five years and not less than two years".

Section 15(4) reads:

> "A registered person who contravenes or fails to comply with any order or restriction imposed on him under this section shall be guilty of an offence and *shall be liable* to imprisonment for a term not exceeding five years and not less than two years."

This section was construed by the learned judge in *Public Prosecutor* v. *Hew Yew*[1] where he reviewed certain authorities on the words "shall be liable" therein. They show that where provisions of law provide for a term of imprisonment or an amount by way of fine, the courts have a discretion to impose a term of imprisonment or fine not exceeding the maximum prescribed. This is in accord with section 60 of the Interpretation Act which reads:

> "60. A written law which prescribes a penalty for an offence shall be construed as providing that the offence shall be punishable on conviction by a penalty not exceeding the penalty prescribed."

He further said:

> "In the context of section 15(4) of the Prevention of Crime Ordinance the words are

'shall be liable to imprisonment for a term not exceeding five years and not less than two years'."

"From that it seems to me that the court has an *absolute discretion* to impose the maximum sentence of 5 years or any lesser sentence the minimum of which must not be less than two years."

In the result, he set aside the order of the learned president and substituted a sentence of two years' imprisonment.

It would appear that in doing so the learned judge was probably of the view that the prescription of a maximum term and a minimum term makes a term of imprisonment mandatory notwithstanding the use of the words "shall be liable". These words were construed by Aitken J. in *Public Prosecutor* v. *Man bin Ismail*[2] where he held that "shall be liable to imprisonment" in section 3(a) of the Vagrants and Decrepit Persons Enactment (F.M.S. Cap. 191) did not render a sentence of imprisonment mandatory. He went on to say:

"To my mind, they give the court an absolute discretion as to whether it shall award a sentence of imprisonment or deal with the accused under and in accordance with the provisions of section 294 of the Criminal Procedure Code."

Here, we would say we have no doubt that if a court were minded to send the offender to prison, it must, as enacted in section 15(4), impose a term of not less than 2 years. Does the prescription of a maximum and a minimum term displace or override what Aitken J. referred to as "an absolute discretion as to whether it shall award a sentence of imprisonment or deal with the accused under and in accordance with the provisions of section 294 of the Criminal Procedure Code?"

Section 294 reads:

"294 (i) When any person not being a youthful offender has been convicted of any offence punishable with imprisonment before any court if it appears to such court that regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed it is expedient that the offender be released on probation of good conduct, the court may, *instead of sentencing him at once to any punishment,* direct that he be released on his entering into a bond with or without sureties and during such period as the court may direct to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour."

This section vests the court before which a person is convicted with power to suspend sentence for such period as the court may direct, and, if the offender behaves himself during such period, he would escape punishment for his offence. If he fails to observe the conditions of his bond, he would be liable to be apprehended and dealt with for his original offence. As Thomson J. (as he then was) said in *Public Prosecutor* v. *Idris*: [3]

"Section 294 which only applies in the case of adult offenders can only be made use of where a person has been convicted and where his conviction is for an offence *punishable with imprisonment without the* option of a fine.

I do not wish to lay down any hard and fast rule, which in any event would be difficult to prove, but magistrates would be well-advised only to make use of section 294 where an offence which is generally of a serious nature and which is punishable with imprisonment has been committed by an adult offender and where it is considered desirable to place him on probation."

In our view, if the legislature intended that section 294 is to cease to have application in respect of an offence under section 15 of the Prevention of Crime Ordinance, it should be so expressed in the clearest possible language. We can find no such provision.

Our answer to the question, we repeat, is in the negative.

Question answered in the negative.

Solicitors: *Datuk S. P. Seenivasagam & Co.*

ISLAND & PENINSULAR DEVELOPMENT LTD. & ANOR. v. REGISTRAR OF TITLES, KEDAH

[O.C.J. (Syed Agil Barakbah J.) June 2, 1973]

[Alor Star — Originating Summons No. 1731 of 1970]

Land — Transfer of — Transfer made to wrong party — Accompanying certificates — Registration — Duty of registrar — Whether formal defect or clerical error — Rectification — National Land Code, ss. 301 and 380.

This was an appeal against the refusal of the Registrar of Titles to rectify the errors in certain transfer documents. The transfer documents and the accompanying certificates were submitted to the registrar for registration. The entries in the two accompanying certificates were correct but the names entered in the instruments of transfer were wrong. Thus the two instruments of transfer and the accompanying certificates did not tally.

The question to be determined was whether the certificates accompanying the instruments of transfer had any legal significance and whether the applicants could have any recourse to section 380 National Land Code for an order to rectify the mistakes in the transfer documents.

Held: the registrar was not under any legal duty to take notice of the certificate including the particulars of transfer when he checked the instruments of transfer for fitness in registration. Accordingly, in the absence of any formal defect or clerical error which required rectification, there was no necessity to have recourse to section 380 National Land Code.

Per Curiam: the filing of any certificate or document not required under the National Land Code does not affect the fitness for registration of an instrument so long as the conditions under section 301 are complied with and the registrar is satisfied that such instrument is fit for registration.

ORIGINATING SUMMONS.

Mr. Triptipal Singh for applicants.

Tunku Dato' Mukhtar (Legal Adviser) for respondent.

Syed Agil Barakbah J.: This is an application by way of originating summons for an order that the Registrar of Land Titles, Kedah, rectifies certain errors in two documents of title to land *viz.* Grant No. 1380 Lot 4417 and Grant No. 1310 Lot 4047, both in the Mukim of Sungei Patani, (hereinafter called the first and second grants respectively) pursuant to section 380 of the National Land Code by deleting the name of the transferee in the first grant and inserting it in the second grant and similarly deleting the name of the transferee and chargor in the second grant and inserting it in the first; and further for the instruments of transfer and charges relating to the two grants to be accordingly rectified.